UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PPG AEROSPACE INDUSTRIES, INC.

and

Case Nos. 10-CA-36530
10-RC-15611

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

ANSWERING BRIEF OF THE UNION IN SUPPORT OF THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION AND IN OPPOSITION TO THE EXCEPTIONS FILED BY THE RESPONDENT

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February 20, 2008

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I. STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

The Board, in *PPG Aerospace Industries, Inc.*, 353 NLRB No. 23 (2008), remanded a portion of case 10-CA-36530 to Judge Cullen "for the limited purposes of (a) reconsidering his crediting of Mayes over Cooper regarding these two statements, (b) explaining, more fully, the basis for his credibility determinations upon reconsideration, and (c) modifying, if necessary, his credibility based findings that Cooper's disputed statements violated Section 8(a)(1)." This consolidated complaint and representation case now comes back before the National Labor Relations Board pursuant to the December 12, 2008 Supplemental Decision by the Honorable Lawrence W. Cullen, Administrative Law Judge in response to the Board's remand. The Board held in abeyance the remaining 8(a)(1) allegations in case 10-CA-36530 and did not address the election objection issues in its September 30, 2008 decision. This is the charging party-petitioner's answering brief in support of the ALJ's supplemental decision and in opposition to the exceptions filed by the respondent.

II. FACTUAL BACKGROUND

In order to not be overly duplicative, The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO ("UAW" or "Union") reavers its statement of facts as set forth in its original answering brief in this case and submits that other than a few relevant facts related to the very narrow issue that was remanded to the ALJ, a full recitation of the facts are unnecessary. Any facts that are relevant to the issue remanded to the ALJ will be set forth as appropriate in the argument section of the Union's answering brief.

III. ARGUMENT

A. The ALJ Correctly Followed the Board's Remand Instructions

Rather than use a surgeon's scalpel to address the narrow issues remanded by the Board and decided by Judge Cullen in his supplemental decision, the respondent uses a bludgeon in a feeble effort to get the Board to submit to its point of view in this case. The respondent's first line of attack is that the ALJ "did not follow directions". (Respondent's Brief, pp. 13-18). Despite the respondent's plaintive wail to the contrary, the ALJ correctly addressed the issues remanded to him by the Board. First, he reconsidered his crediting of Iva Mayes over Sue Cooper. Second, he explained more fully the basis of his credibility determinations. And third, he considered whether it was necessary to modify his original credibility resolutions. (See Supplemental ALJD, pp.2-5). Ultimately, after reconsidering the issue, Judge Cullen arrived at the same decision regarding the credibility issue of Mayes and Cooper. The respondent's real complaint dressed up as an exception, is that the ALJ did not, after reconsidering his previous credibility determination, find that Cooper was more credible than Mayes.

While the respondent might quibble with the ALJ's supplemental determinations regarding the credibility issue, to bitterly complain that the ALJ "did not follow" directions on remand is farcical. Apparently the respondent has decided it is wise to attack the ALJ to deflect attention from the fact that the Judge did not credit, once again, its witness over the General Counsel's witness. "This may reflect not only the laudable zeal of [PPG's] advocates, but also a misunderstanding" of the ALJ's duty on remand to reconsider and more fully explain this credibility determination. See, *Advocate South Suburban Hospital v. NLRB*, 468 F.3d 1038, 1044 (7th Cir. 2006). Like the respondent in *Advocate*, the respondent here "seems to believe that reversal is automatic if it can dig

up an argument for its position of whatever strength that the [ALJ] failed to explicitly address in [PPG's] chosen terms." *Id.* Simply because the ALJ did not credit the respondent's witness or perform the credibility analysis in the respondent's "chosen terms" is no basis to conclude that the ALJ "did not follow" directions. The respondent's exceptions here are without merit and due to be overruled.

B. The ALJ Properly Credited Mayes Over Cooper

1. The ALJ Properly Applied the *Flexsteel* Presumption

The ALJ's instructions on remand were specific and narrow. He was to reconsider his previous credibility determination regarding General Counsel witness Iva Mayes and respondent witness Sue Cooper regarding two statements allegedly made by Cooper, explain more fully the basis for his reconsideration and make any modifications to his findings as necessary. The ALJ did so and he arrived at the same conclusion as in his original decision.

The respondent contends that the ALJ illegitimately credited Mayes because of her status as a "current employee" and in so doing, violated not only the NLRA but the Administrative Procedure Act, 5 U.S.C. §§ 554 and 557. (Respondent's brief, pp. 19-22). The respondent bases this argument in part on the unsupported claim that Mayes is a "discriminatee" and therefore not a "disinterested party". (Respondent's brief, p. 20). The respondent makes the claim that Mayes is a discriminatee based on paragraph 7 of the complaint in this case. Paragraph 7 of the complaint alleges, inter alia, that the respondent through its agents, including Sue Cooper "more closely scrutinized and monitored the movements and conversations of employees because they supported the Union's organizing campaign." (Complaint, p. 2). Mayes is not individually named as a discriminatee here nor is any employee. The complaint references "employees" not anyone individual. If the

respondent's argument is to be given weight, then all PPG employees are dicriminatees and no employee could testify as a "disinterested party".

Furthermore, the respondent mischaracterizes and misinterprets the Board's decision in *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995). In *Flexsteel*, the Board held that "a witness' status as a current employee may be a significant factor, but it is one among many which a judge utilizes in resolving credibility issues." *Id.* at 745. The employee in *Flexsteel* to whom the ALJ initially attached the presumption at issue in that case, Darren Robinson, testified that his supervisor subjected him to 8(a)(1) threats and interrogated him about whether he has signed a union authorization card. *Flexsteel*, 316 NLRB at 748. The ALJ in *Flexsteel* also recounted the various threats made to other employees, to whom he applied the same presumption at issue in this case. Under the respondent's novel theory, Mr. Robinson and the other employees referred to in the ALJ's decision in *Flexsteel* would be considered "discriminatees". The Board in *Flexsteel*, however, drew no such distinction in that case and the respondent cites to only an Administrative Law Judge's dicta in *Whirlpool Corp.*, 337 NLRB 726, 733 (2002) that was not adopted by the Board to support its theory on this point.[1] Certainly, it is not the "per se" rule that respondent contends here.

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[1]The ALJ in *Whirlpool* recognized the *Flexsteel* presumption and that it applied in that case. 337 NLRB at 733 n. 21. He declined to fully apply it, however, because the witness was a staunch union supporter. The ALJ's decision on this point is dicta and nothing more. See, *Whirlpool Corp.*, 337 NLRB at 727 fn. 4 (2002) ("It is well settled that the Board's adoption of a portion of a judge's decision to which no exceptions are filed does not serve as precedent for any other case."). The respondent in this case failed to cite to any Board decision that modified or distinguished *Flexsteel* on the basis that respondent now advances. Indeed, such a distinction would render the *Flexsteel* presumption virtually inapplicable in any case involving 8(a)(1) or 8(a)(3) threats. Moreover, such a distinction, if applied even-handedly, would then make any employee's testimony, whether staunch union or anti-union, to not be entitled to the presumption. Under respondent's theory, the only "disinterested" party would be someone who took no side in an election campaign.

The respondent's argument here falls far short of its mark. Indeed, even a cursory review of the cases that have cited *Flexsteel* since it was issued shows that many of the employees to whom the presumption was applied, were victims of 8(a)(1) conduct and union supporters, like Mayes in this case. See, e.g., *Advocate South*, 468 F.3d at 1046-47 (Approving of NLRB's application of *Flexsteel* presumption and rejecting employer's argument that it should not apply because current employee was a union supporter and thus biased); *Bloomington-Normal Seating Co., v. NLRB*, 357 F.3d 692, 695 (7th Cir. 2004); *Wiers Iinternational Trucks, Inc., et al.*, 353 NLRB No. 48, 48, 2008 WL 4774554, *36, 185 L.R.R.M. (BNA) 1206 (N.L.R.B. Oct 31, 2008); *Majestic Towers, Inc.*, 353 NLRB No. 29, 2008 WL 4492582, *22, 185 L.R.R.M. (BNA) 1247 (N.L.R.B. Sep 30, 2008) The *Flexsteel* presumption does not fail to apply in this case because Mayes was the victim of 8(a)(1) threats. Administrative Law Judge Cullen acknowledged the Board's limitation of the *Flexsteel* presumption that it does not automatically confer credibility and he applied it correctly in this case. (Supplemental ALJD, pp. 2-3). Left with nothing to support its argument that its witness should be credited, the respondent simply conjures up a nonexistent rule to claim that *Flexsteel* does not apply in this case. The Union submits that the Board should decline the respondent's debilitating invitation to create a new rule.

2. The ALJ Considered All the Relevant Evidence in Reaching His Decision

Contrary to the respondent's contention, the ALJ did not fail to consider "contrary evidence" in reaching his credibility resolution. Any fair reading of the ALJ's decision reveals that he did exactly what the Board directed him to do. He considered the prior statements of Mayes, weighed them in the context of the testimony of Mayes and Cooper and the record evidence and arrived at the same conclusion he had reached in his original decision. (Supplemental ALJD, pp. 3-5). The ALJ

set forth the precise reasons for his credibility resolution and considered everything that was before him. The respondent's argument here amounts to nothing more than "variations on the theme that the ALJ should have found its witness[] credible." *NLRB v. Jewish Home for the Elderly*, 174 Fed. Appx. 631, 182 LRRM 2384 (2nd Cir. 2006). The ALJ did not ignore any purported contrary evidence. What the respondent's real complaint boils down to is that the ALJ did not reach the same conclusions that respondent did regarding the evidence before him. The "respondent cannot prevail simply by recasting the evidence in the light most favorable to the respondent." *Id.*

Similarly, respondent's continuing whine that the ALJ ignored contrary evidence is in the main, based on supervisor Cooper's blanket denial that she made the two statements in question. The ALJ considered Cooper's denials and found that the demeanor between Cooper and Mayes was not determinative of the credibility issue so he properly based his credibility determination "on the weight of the perspective evidence, established or admitted facts, inherent probabilities, 'and reasonable inferences, which may be drawn from the record as a whole.'" *Daikichi Corp.*, 335 NLRB 622, 623 (2001) (citing in part *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)). The fact that Cooper made blanket denials is not a basis to conclude that Mayes was not telling the truth when she testified. The Judge carefully parsed the evidence before him and considered Mayes testimony, the unsworn union incident report,[2] Cooper's testimony and the other record evidence. The ALJ is the finder of fact, not the respondent, and "substantial evidence may support a factfinder's belief in a witness despite prior inconsistent statements." *Advocate South*, 468 F.3d at 1046. Indeed, as has

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[2]The respondent refers to the union incident report as being made contemporaneously with the event in question. (Resp. Brief, p. 17). There is nothing in the record that shows that the report was made contemporaneously with the incident. It may have been prepared that day, but there is no record of evidence that Mayes prepared it as the incident was happening or shortly thereafter.

been often quoted, "[i]t is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

The incident report that Mayes submitted to the Union stated in pertinent part:

> "Give detailed description of the incident:
>
> 9/1/06
>
> Sue Cooper (Supervisor)
> Rodney Brownfield — 29 call?
> Jon Smith — Euro
> Dan Utterly — Euro
> Jeff Lindsey — Euro
>
> All were talking for about an hour then split into two groups. Rodney and Jeff were talking about the union. Sue was on the other side of the cell talking to Jon, Jeff, and Dan. When I walked over to listen to what Jeff was saying, Sue came over and told me she could not have me over there out of my cell when I was openly supporting the union. She told me that if we got a union, she would not be able to talk without a union rep involved. Also, she asked me if I had ever missed a pay check or hadn't I got salary continued. Fifteen minutes after this time, Shelby Elkins was also in the group but no one said anything to them about going back to work." (Resp. Ex. 2).

A careful review of Mayes' testimony about this incident reveals that the inconsistencies between her incident report and her hearing testimony are minor. (Compare Resp. Ex. 2 and transcript, pp. 16-19, 36-37 and 38-39). In her incident report she wrote that Cooper told her that she couldn't be out of her cell when she was openly supporting the Union. It is undisputed that union supporter Brownfield was in the cell talking to Lindsey. Mayes' testimony refers to Cooper admonishing her for being out of her cell and that she couldn't let two union supporters "gang up" on a non-union supporter. It is

clear from both the incident report and the testimony that Cooper was intent on preventing union supporters from congregating.

Similarly, the incident report clearly refers to the salary continuance benefit and Cooper's veiled threat that it would be taken away if the employees voted in the Union. This is consistent, with Mayes' testimony. The respondent in its brief appears to believe that it has discovered the Da Vinci code because it can point out that Mayes' incident report did not include everything she remembered and testified to about the conversation with Cooper that day. These are not direct contradictions between Mayes incident report and her testimony. Rather, they differ in only minor respects and the essence of the event, that Cooper would not allow union supporters to congregate and she threatened elimination of the salary continuance benefit, was confirmed by both. Counsel for the respondent chose not to cross-examine Mayes on her NLRB affidavit. If there had been some contradiction or discrepancy between Mayes' testimony and her pretrial affidavit, surely respondent would have pointed it out. The fact of the matter is that Mayes' sworn testimony was consistent and respondent's reliance on the unsworn union incident report as a basis to argue that the ALJ should have wholly discredited Mayes is without merit.

3. The Respondent's Missing Witness Argument

Likewise, respondent's "missing witness" argument is without merit. The respondent argues that the General Counsel did not corroborate Mayes' version of events because he did not call Rodney Brownfield or the other participant in the conversation, Jeff Lindsey, a known anti-union supporter to testify. (Respondent's brief p. 25). Respondent contends that this purported failure to call Brownfield "destroys" Mayes' credibility. The respondent's implication is that Brownfield did not testify because he would not have supported Mayes' version of events. "The argument collapses

when one considers that [PPG] had the power to compel testimony." *Advocate South*, 468 F.3d at 1049. Just like the employer in *Advocate South*, if Brownfield could have done such damage to the credibility of Mayes, then why didn't PPG put him on the stand? Better yet, if what Cooper said was true, then why didn't PPG put Jeff Lindsey, a staunch anti-union supporter on the stand to corroborate Cooper's version of events? As the Seventh Circuit pointed out in *Advocate South*, the inference that PPG urges here "can be turned back at itself, which is why . . . a party can take advantage of the 'missing witness' rule only when 'the missing witness' was peculiarly in the power of the other party to produce." *Advocate South*, 468 F.3d at 1049 (quoting in part from *J.C. Penney Co., v. NLRB*, 123 F.3d 988, 996 n. 2 (7th Cir. 1997)).[3] Accordingly, the respondent's exception here should be overruled.

The respondent's additional claim that even if violations are to found that no rerun election should be held because Cooper's unlawful comments were few and isolated, should be rejected. Even if Cooper's unlawful statements were "few" and "isolated" as the respondent contends, the ALJ found that the respondent engaged in other unlawful conduct, including conduct inherently destructive of section 7 rights. (See ALJD, pp. 8-11). Cooper's unlawful statements were not the only violations of the Act committed by the respondent that warrants setting aside the election and ordering a rerun. The Union submits that should the Board affirm the ALJ's findings then a rerun election is the appropriate remedy. See, *Consolidated Biscuit Co.*, 346 NLRB 1175 (2006), order

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[3]The Seventh Circuit's opinion on this point acknowledges that some Board cases are to the contrary of its precedent but rejects the rationale of those cases. *Advocate South*, 468 F.3rd at 1049, n. 8. It points out, however, the problem with such a rationale and that the "NLRB is not free to arbitrarily declare that it will accept the plausible inference against the NLRB's general counsel but not the equally plausible and counterbalancing inference against Advocate." *Id.*

enforced by, *N.L.R.B. v. Consolidated Biscuit Co.*, 2008 WL 4922425, 185 L.R.R.M. (BNA) 2385 (6th Cir. Nov 14, 2008).

IV. CONCLUSION

Based on the foregoing, the Union respectfully submits that the Administrative Law Judge's supplemental decision should be affirmed in all respects and the respondent's exceptions overruled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answering Brief of the Union was electronically filed with the National Labor Relations Board and served by U.S. mail to:

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On this the 20th day of February, 2009.

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